



Agricultural Marketing Service

7 CFR Parts 929 and 926

[Doc. No. AMS-SC-23-0047]

Cranberries Grown in Massachusetts, et al; Termination of Marketing Order and Data Collection Requirements for Cranberries Not Subject to the Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed action invites comments on the proposed termination of the Federal marketing order regulating the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York and the rules and regulations issued thereunder (Marketing Order No. 929). The data collection, reporting and recordkeeping requirements applicable to cranberries not subject to the cranberry marketing order would also be terminated.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments can be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720-8938; or Internet: <https://www.regulations.gov>. Comments should reference the document number and the date and page number of this issue of the **Federal Register** and can be viewed at: <https://www.regulations.gov>. All comments submitted in response to this proposal will be included in the record and will be made available to the public. Please be advised that

the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Chief, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375 or Email: Jennie.Varela@usda.gov or Christian.Nissen@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-8085 or Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes the termination of regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 929, as amended (7 CFR part 929), regulating the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. Part 929 referred to as the "Order" is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Cranberry Marketing Committee (Committee) locally administers the Order and is comprised of producers operating within the production area and a public member.

This proposed rule is also issued under section 8d of the Act (7 U.S.C. 608d(3)), which authorizes the collection of cranberry and cranberry product information from producer-handlers, second handlers, processors, brokers, and importers including those not subject to regulation under the Order.

The United States Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders

12866, and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

In addition, this proposed rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal governments, which requires agencies to consider whether their rulemaking actions would have Tribal implications. Agricultural Marketing Service (AMS) has determined this proposed rule is unlikely to have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to a marketing order may file with the USDA a petition stating that the marketing order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act

provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The Order has been in effect since 1962 and regulates the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. The Order provides the cranberry industry with authority for production research, marketing promotion and development, to include paid advertising, as well as authority for volume regulation through producer allotments or handler withholding. The Order also authorizes reporting and recordkeeping functions required for operation of the program. The Committee, which locally administers the Order, is funded by assessments imposed on handlers.

This rule proposes termination of the Order and the rules and regulations thereunder. This action is based on the results of a continuance referendum in which producers failed to support continuation of the Order. USDA believes termination of this program would be appropriate as the Order is no longer favored by industry producers.

Section 929.69 of the Order states USDA shall conduct a referendum during the month of May 1975 and every fourth year thereafter to ascertain whether continuance is favored by producers. Under this section, USDA shall terminate the Order if termination is favored by a majority of the growers, and that this majority has, during the current fiscal year, produced more than 50 percent of the cranberries produced in the production area. As required by the Order, USDA held a continuance referendum among cranberry producers from June 9 through June 30, 2023, to determine if they favored continuation of the program.

USDA mailed ballots to 944 producers in the production area. Those producers cast 366 valid ballots. The results indicate 73.5 percent of cranberry growers, who produced 79.9 percent of the production volume, voted in the referendum and favored termination of the program. Consequently, the vote met the Order's criteria for termination, demonstrating a lack of the producer support needed to carry out the objectives of the Act.

Section 608c(16)(A) of the Act provides that USDA shall terminate or suspend the operation of any order whenever the order or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act. Based on the foregoing, and pursuant to section 608c(16)(A) of the Act and § 929.69 of the Order, USDA is considering termination of the Order. If USDA decides to terminate the Order, trustees would be appointed to conclude and liquidate the affairs of the Committee and would continue in that capacity until discharged by USDA. In addition, USDA would notify Congress of USDA's intent to terminate the Order not later than 60 days before the Order is terminated pursuant to section 608c(16)(A) of the Act.

A notice announcing the results of the referendum was issued on August 16, 2023. On October 25, 2023, USDA suspended collection of assessments and all reporting requirements under the Order while the proposed termination of the program is being processed. All other provisions, including promotion and research, would remain in effect until the Order is terminated.

Section 608d(3) of the Act authorizes the collection of cranberry and cranberry product information from producer-handlers, second handlers, processors, brokers, and importers. This data collection is codified in 7 CFR part 926, Data Collection, Reporting and Recordkeeping Requirements Applicable to Cranberries Not Subject to the Cranberry Marketing Order, establishing reporting requirements for cranberry and cranberry products not subject to the Order and how they were to be reported to the Committee.

Section 926.21 states this part shall be suspended or terminated whenever there is no longer a Federal cranberry marketing order in effect. This proposal would also terminate part 926 which has been suspended since December 28, 2006.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), USDA has considered the economic impact of this proposed rule on small entities. Accordingly, USDA has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 950 cranberry growers in the regulated area and approximately 45 cranberry handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$3,750,000, (North American Industry Classification System (NAICS) code 111334) and small agricultural service firms are defined as those whose annual receipts are less than \$34,000,000 (NAICS code 115114) (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), the average grower price for U.S. cranberries during the 2022-23 season was \$36.60 per barrel and utilized production was 8,010,070 barrels. The value for cranberries that year totaled \$293,168,562, (\$36.60 per barrel multiplied by 8,010,070 barrels). Taking the total value of production for cranberries and dividing it by the total number of cranberry growers provides an average return per grower of \$308,598. Using the average price and

utilization information, and assuming a normal distribution, the majority of cranberry growers receive less than \$3,750,000 annually.

According to USDA's Market News retail averages report, the price per pound of fresh cranberries on average was \$1.64 in December of 2022. On average, NASS reports that grower prices for fresh cranberries are almost double (199 percent) grower prices for processed cranberries. Dividing the average fresh retail price as reported by Market News (\$1.64) by 1.99 calculates to an estimated average retail processed price of \$0.82 per pound. There are 100 pounds of cranberries per barrel so the average retail price for a barrel of cranberries would be \$82. Multiplying the average retail price by total utilization of 8 million barrels results in an estimated cranberry retail value of \$656 million. Dividing this figure by the number of handlers (45) yields an estimated average annual handler receipts of \$14.6 million, which is below the SBA threshold for small agricultural service firms. Therefore, the majority of producers and handlers of cranberries may be classified as small entities.

This rule proposes to terminate the Order, and the rules and regulations issued thereunder. Termination would remove the Order from the Code of Federal Regulations. Section 929.69 of the Order provides that USDA shall conduct a referendum during the month of May 1975 and every fourth year thereafter to ascertain whether continuance is favored by producers. The section states USDA shall terminate the Order if termination is favored by a majority of the growers, and if that majority has, during the current fiscal year, produced more than 50 percent of the cranberries produced in the production area. The results of a continuance referendum held from June 9 through June 30, 2023, indicate 73.5 percent of cranberry growers, who produced 79.9 percent of the production volume, voted in the referendum and favored termination of the program. Consequently, the vote met the Order's criteria for termination, indicating continuance of the program is no longer favored by industry producers. Consequently, USDA is considering termination

of the Order. This proposed rule would also terminate part 926, the suspended data collection requirements for cranberries not covered under the Order.

Marketing orders provide industries with tools to assist producers and handlers in addressing challenges facing the industry. These tools include establishing minimum grade, size, quality, and maturity requirements, setting size, capacity, weight, dimensions or pack of the containers, collecting and publishing market information useful to producers and handlers, conducting research and promotions, and establishing volume control requirements. Each marketing order is different, with the industries deciding the authorities needed and the scope of their marketing order. Marketing orders are approved by producers through referenda and regulate handlers to ensure compliance with all requirements. The authority of a marketing order allows each industry to create a local administrative committee that is made up of growers and/or handlers that work collectively to solve industry problems.

The Order has been in effect since 1962 and provides the cranberry industry with authority for production research, marketing promotion and development, to include paid advertising, as well as authority for volume regulation through producer allotments or handler withholding. The Order also authorizes reporting and recordkeeping functions required for operation of the program. The Committee, which locally administers the Order, is funded by assessments imposed on handlers. As this change would terminate the Order and all the rules and regulations issued thereunder, the perceived benefits correlated with the Order would be lost. However, there would also be savings by eliminating costs associated with the Order, which include the payment of assessments and costs related to reporting and occasional volume regulation.

A review of the referendum results shows that producers failed to reach the necessary threshold for the vote to pass by either vote or by volume as specified in the Order, indicating that voting producers believe the benefits of the program no longer

outweigh the costs to handlers and producers. Although marketing order requirements are applied to handlers, the costs of such requirements are often passed on to producers. Termination of the Order, and the resulting regulatory relaxation, could therefore be expected to reduce costs for both producers and handlers.

An alternative to this action would be to maintain the Order and its current provisions. However, the Order requires that a continuance referendum be conducted every fourth year to determine industry support for the program. The results of a recently held producer continuance referendum on the cranberry program indicated a lack of producer support, indicating that the Order no longer meets the needs of producers and handlers. Therefore, this alternative was rejected, and USDA is considering terminating the Order and removing the suspended data collection requirements in part 926.

This proposed rule is intended to solicit input and other available information from interested parties on whether the Order should be terminated. USDA will evaluate all available information prior to making a final determination on this matter.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0189 Fruit Crops. Termination of the Order, and the reporting requirements prescribed therein, would reduce the reporting burden by 1,265 hours. Handlers would no longer be required to file forms with the Committee, which is expected to reduce industry expenses. This rulemaking would not impose any additional reporting or recordkeeping requirements on either large or small cranberry handlers.

This rulemaking would effectuate the removal of reporting and recordkeeping requirements on cranberry handlers, both small and large. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA

has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

USDA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

The producer referendum was well publicized in the production area, and referendum ballots were provided to all known producers. As such, producers of U.S. cranberries had an opportunity to indicate their continued support for the Order. Further, interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this proposed action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on the proposed termination of Marketing Order No. 929, which regulates the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

Based on the foregoing, and pursuant to section 608c(16)(A) of the Act and § 929.69 of the Order, USDA is considering termination of the Order. If USDA decides to terminate the Order, trustees would be appointed to conclude and liquidate the Committee affairs and would continue in that capacity until discharged by USDA. In

addition, USDA would notify Congress 60 days in advance of termination pursuant to section 608c(16)(A) of the Act.

List of Subjects

7 CFR Part 926

Cranberries, Reporting and recordkeeping requirements.

7 CFR Part 929

Acreage allotments, Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, and under the authority of 7 U.S.C 601-674, the Agricultural Marketing Service proposes to amend title 7, chapter IX of the Code of Federal Regulations by removing parts 926 and 929.

PART 926—[REMOVED]

PART 929—[REMOVED]

Erin Morris,

Associate Administrator,

Agricultural Marketing Service.

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